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Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. 351

PADDOCK POOL BUILDERS, INC., PADDOCK POOL EQUIPMENT CO., INC., and PADDOCK OF CALIFORNIA, INC.,

Petitioners,

v.

GEORGE R. WHITTEN, JR., INC., doing business as Whitten Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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v.

GEORGE R. WHITTEN, JR., INC., doing business as Whitten Corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners pray that a writ of certiorari be issued to review the judgment entered in this cause by the United States Court of Appeals for the First Circuit.

OPINION BELOW

The opinion of the court of appeals is reported at 424 F.2d 25. It is reprinted as Appendix A hereto.[1] No opinion was delivered by the district court.

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[1] The printed record used in the court below and certified to this Court was designated "Appendix to Brief for Plaintiffs." It will be cited in this petition as "App. to Pl. Br."

JURISDICTION

The judgment of the court of appeals was entered March 25, 1970. On June 16, 1970, Mr. Justice Brennan entered an order extending the time for filing this petition until July 3, 1970. The jurisdiction of this Court to review the judgment of the court of appeals is conferred by 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether petitioners' efforts to induce governmental bodies to adopt restrictive specifications for swimming pool recirculation systems can form a basis for a finding of liability under the antitrust laws where the only injury claimed by respondent resulted from governmental action in adopting and promulgating such specifications.

STATUTES INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. Sections 1 and 2, and Sections 4 and 16 of the Clayton Act, 38 Stat. 730, 15 U.S.C. Sections 15 and 26, all of which are set forth in Appendix B to this petition.

STATEMENT OF THE CASE

This is a private antitrust action for treble damages and injunctive relief, brought under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. Petitioners (referred to collectively as "Paddock") are three affiliated companies

engaged in the manufacture and distribution of swimming pool recirculation and filtration systems and various items of accessory equipment used in swimming pools. Paddock's principal product is a prefabricated, pipeless metal swimming pool gutter system. Respondent (referred to as "Whitten") manufactures and sells a similar prefabricated pipeless metal gutter system.

The dispute between Paddock and Whitten arises out of their respective efforts to sell their competing gutter systems to state and local governmental agencies desiring to construct public swimming pools.[2] More particularly, the dispute arises principally from a selling practice engaged in by both Whitten and Paddock, namely, the publication and promotion of model construction specifications that may be copied or adopted, in whole or in part, by a public body that is contemplating inviting bids for the construction of a swimming pool.[3]

Whitten charges that the specifications promulgated by Paddock are "proprietary" and "restrictive", in that only

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[2] These systems reflect a relatively recent advance in swimming pool design. Their principal advantage is in the elimination of buried piping around the perimeter of the pool. The concept of a prefabricated pipeless gutter system has received wide acceptance only within the past few years, and the market for such systems is constantly expanding.

Whitten estimates that since 1967 more than 25,000 pools have been constructed in the United States in which the Whitten gutter system could potentially have been used. (App. to Pl. Br., pp. 36-37) Whitten's claim for damages is based upon losses allegedly sustained by Whitten in connection with 24 pool projects on which Whitten and Paddock were competitors. (App. to Pl. Br., pp. 30-31)

[3] Whitten states that the "vast majority" of public contracts for swimming pools are awarded on the basis of public bidding to the lowest bidder who can meet the specifications prescribed by the public body. (App. to Pl. Br., p. 111)

Paddock and its product can satisfy them.[4] It further charges that Paddock promoted the adoption of such "restrictive" specifications for the purpose of eliminating competition in the public swimming pool industry, in violation of sections 1 and 2 of the Sherman Act.

Following initial discovery by both petitioners and respondent Paddock moved for summary judgment.[5] For the purposes of its motion Paddock admitted all material allegations of the complaint—specifically, it admitted that its model specifications were restrictive and that they were offered to public bodies for the purpose of excluding competitive sellers of recirculation systems.[6]

Paddock's motion was grounded on the proposition that this Court's decisions in *Eastern R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), preclude liability under the antitrust laws based upon Paddock's

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[4] The basic provision in Paddock's model specifications that Whitten challenges is one that provides that the swimming pool's recirculation system "shall be Paddock of California's 'Integral Flow Recirculation System' as manufactured by Paddock Pool Equipment Company, Inc., Albany, New York, or an approved equal." (App. to Pl. Br., p. 26) This specification would exclude Whitten's system in any case where Whitten was not able to convince the purchasing agency that its system could perform equally with Paddock's. (App. to Pl. Br., pp. 116-17)

[5] Paddock's motion raised no issues of fact, and was in essence a motion to dismiss for failure to state a claim on which relief can be granted. It was styled a motion for summary judgment solely because it raised matters outside the complaint itself. See Fed. R. Civ. P. 12(b).

[6] The court of appeals recognized that these admissions were made *arguendo* solely to pose the legal issue. It pointed out that "Paddock, using a perfectly proper tactic to bring sudden death to litigation which could be protracted, has conceded far more concerning its motives and techniques than any subsequent proof might establish." (App. A, p. 3a)

efforts to induce government agencies to adopt its model specifications. In addition, Paddock argued that under this Court's decision in *Parker* v. *Brown*, 317 U.S. 341 (1943), it could not be held liable under the antitrust laws where the injury to Whitten resulted from the actions of government agencies in adopting Paddock's model specifications.

The district court entered judgment dismissing the complaint. On appeal by Whitten the court below vacated the judgment of the district court and remanded the case for further proceedings.

REASONS FOR GRANTING THE WRIT

I.

The Question Presented Is Substantial

In vacating the judgment of the district court, the court below engrafted significant limitations upon the interpretations of the Sherman Act announced by this Court in *Parker* v. *Brown*, 317 U.S. 341 (1943), *Eastern R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). These limitations are both inconsistent with the rationales on which those cases were decided and unwarranted by decisions of this or any other court.

In *Parker* the Court held that the Sherman Act was not intended as a prohibition on state action, even though such action might have the effect of restricting competition. A host of cases decided in this Court and lower courts since *Parker* has, on the basis of *Parker*, rejected claims

against private parties under the antitrust laws where the alleged restraint or injury results from governmental action.

Noerr and *Pennington* reaffirmed and extended the *Parker* rule. In those cases the Court held that a private party may not be held liable under the antitrust laws for conduct intended to bring about governmental action—despite the fact that such conduct has as its ultimate objective the elimination of competition—where the injury to the plaintiff results from that governmental action.

There is no dispute in this case that any injury suffered by respondent resulted from action solicited by petitioners and independently taken by government agencies[7]—namely, the adoption of "restrictive" specifications for swimming pool recirculation systems. Thus, ~~under the~~ *Parker* and *Noerr-Pennington* rules the district court was clearly correct in dismissing the complaint. The court of appeals held, however, that *Noerr* and *Pennington* only confer antitrust immunity upon parties seeking governmental action when that action is "political" or "regulatory" in nature, and that the rule of these cases is inapplicable where the government is acting as a "consumer". Thus, in the lower court's view, where private parties seek to gain competitive advantage in selling their products to government agencies by persuading those agencies to adopt "restrictive" standards or specifications, such conduct is subject to the full force of the antitrust laws.

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[7] Whitten made clear in the court below that it does not contend that any public official has been involved in any "conspiracy" with petitioners. (Brief for Plaintiff, p. 9) It further concedes that it does not allege any coercion of public officials by Paddock. (App. to Pl. Br., pp. 41, 121)

Moreover, notwithstanding the fact that any injury to petitioner was clearly caused by governmental action, the court held the *Parker* rule inapplicable. It held that governmental action is excluded from the scope of the antitrust laws under *Parker* only when that action is taken in the context of a regulatory program under which the government has determined to supplant free competition with some degree of public regulation. Finding no such determination in the instant case the court held that the *Parker* "immunity" was not applicable to petitioners' conduct.

Petitioners respectfully submit that the court of appeals' decision is in clear conflict with *Parker*, *Noerr* and *Pennington*.

A. The Decision of the Court Below Is in Conflict With This Court's Decision in *Noerr* and *Pennington*

Noerr involved a bitter competitive battle between the railroads and long-haul truckers. The essence of the truckers' complaint was that the railroads had conspired to restrain trade in and monopolize the long-distance freight business, in violation of sections 1 and 2 of the Sherman Act, by engaging in efforts "to foster the adoption and retention of laws and law-enforcement practices destructive of the trucking business." 365 U.S. at 129.

This Court accepted as its "starting point" for consideration of the case the fundamental proposition that neither individual nor joint action intended to influence the passage or enforcement of laws can be the predicate for a violation of the Sherman Act, even where the action sought would produce a restraint or monopoly. It pointed out that this proposition was based upon the well-settled rule—articulated in *Parker* v. *Brown*, among other cases—that

the Sherman Act "must be taken to be a prohibition of individual and not state action." Thus,

> where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out.

365 U.S. at 136.

The precise issue presented in *Noerr* was whether, notwithstanding this "controlling principle," the intent and methods of the railroads in seeking governmental action were of such character as to warrant a different result. Specifically, the issue was whether an anticompetitive or monopolistic intent or the use of deception in efforts to influence such action destroyed the immunity the railroads would otherwise have. 365 U.S. at 139.

The Court flatly refused to permit any such erosion of the basic principle. It held that even if the sole purpose of the railroads was to destroy the truckers as competitors, that intent could not turn otherwise lawful conduct into a violation of the antitrust laws. The Court said (365 U.S. at 139):

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.

Similarly, the Court held that it was "legally irrelevant" to the issue of antitrust violation that the communications

by which the railroads sought to influence governmental action were themselves deceptive. Even deliberate deception "can be of no consequence so far as the Sherman Act is concerned." 365 U.S. at 145.

In *United Mine Workers v. Pennington*, 381 U.S. 637 (1965), the Court reiterated in the strongest terms that joint efforts to influence public officials cannot violate the antitrust laws even though such conduct is "part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.[8] The Court emphasized that "nothing could be clearer from the Court's opinion [in *Noerr*] than that anticompetitive purpose did not illegalize the conduct there involved." 381 U.S. at 669. Significantly, *Pennington* involved precisely the same issue as is involved in the instant case—efforts to influence purchasing activity by a government agency.

In *Pennington* the UMW and a group of large coal mine operators had combined in an effort to exclude certain small operators from selling coal to the Tennessee Valley Authority. They sought to accomplish this purpose in two ways: First, they approached the Secretary of Labor to obtain establishment of a high minimum wage, under the Walsh-Healey Act, for employees of companies selling coal in the TVA term contract market. Second—and most important for the purposes of this case—they approached TVA itself in an effort to persuade it to curtail its spot

[8] In *Pennington* the court of appeals had "considered *Noerr* as applying only to conduct 'unaccompanied by a purpose or intent to further a conspiracy to violate a statute. It is the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal.'" 381 U.S. at 669-70.

market purchases, a substantial portion of which were exempt from the Walsh-Healey order.[9] 381 U.S. at 660-61.

The trial court in *Pennington* instructed the jury

> that the approach to the TVA was not a violation of the antitrust laws "unless the parties so urged the TVA to modify its policies in buying coal for the purpose of driving the small operators out of business".[10]

381 U.S. at 670. This Court held the instruction erroneous, and pointed out that *Noerr* would not permit a finding of antitrust illegality to be based upon the approaches to TVA or the Secretary of Labor. The Court reiterated that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.*

Petitioners submit that the lower court's decision in the instant case is in clear conflict with the decisions of this Court in *Noerr* and *Pennington*. In addition, it is in admitted direct conflict with the decision of a district court in another circuit—*United States* v. *Johns-Manville Corp.*,

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[9] The court of appeals in *Pennington* explained the distinction between the spot and term markets as follows (325 F.2d 804, 814):

> TVA buys coal under term and spot market bids. The spot market involves small orders of coal to be delivered in a short period of time, which offers definite advantages to small companies with weak financial resources, which can thus avoid long-term commitments. About seventy-five percent of TVA coal is bought on term contracts and about twenty-five percent on spot contracts.

[10] Separate, but substantially identical instructions were given with respect to the approach to the Secretary of Labor. 381 U.S. at 670.

259 F. Supp. 440 (E.D. Pa. 1966).[11] As the court below conceded, *Johns-Manville* presented the "precise issue" raised in the instant case and "substantially similar facts." In that case—a civil antitrust action brought by the government—a group of domestic pipe manufacturers were charged with a conspiracy to restrain and monopolize trade in asbestos-cement pipe. The conspiracy was alleged to have consisted, *inter alia*, of concerted efforts to induce governmental purchasers of asbestos-cement pipe to adopt restrictive specifications that would have the effect of excluding competition from foreign-made pipe.[12] The district court viewed *Noerr* and *Pennington* as controlling on this issue and granted summary judgment to defendants, saying (259 F. Supp. at 452-53):

> that any concerted activities engaged in by J-M to influence the decision of public officials on pipe specifications are *constitutionally protected* and cannot be the basis of a finding of violation of the antitrust laws, . . . regardless of the intent with which they were undertaken.[13] [Emphasis added.]

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[11] While the conflict between the court of appeals' decision in the instant case and the decision in *Johns-Manville* is not technically a conflict between circuits such as is contemplated in Rule 19(1)(b) of this Court's Rules, *Johns-Manville* was a case in which the only appeal available was directly to this Court. Thus, no circuit court decision was possible. Had the instant case been presented to this Court at the same time as an appeal in *Johns-Manville* the conflict would have been sufficient to warrant a grant of certiorari. *Cf. Shapiro* v. *United States*, 335 U.S. 1, 4 (1948).

[12] It was alleged, for example, that the defendants promoted the adoption of a requirement that all pipe be tested in the United States. 259 F. Supp. at 454.

[13] The government did not appeal from this judgment. See 340 ATRR A-4 (Jan. 16, 1968).

An analogous situation was presented in *Household Goods Carriers' Bureau* v. *Terrell*, 417 F.2d 47 (5th Cir. 1969). Both Terrell

B. The Decision of the Court Below Is in Conflict With This Court's Decision in *Parker* v. *Brown*

Parker holds that the Sherman Act was not intended to apply to governmental action, and therefore injury caused by governmental action is not compensable in a private antitrust suit. The court below held, however, that petitioners could be held liable for injury caused respondent as the result of acts of government agencies in adopting petitioners' restrictive specifications. It asserted that such agencies could not confer antitrust "immunity" on petitioners under *Parker* where the effect of the specifications was anticompetitive and the government intended free competition to prevail. The fundamental error in the lower court's decision lies in its characterization of *Parker* as establishing a rule of antitrust "immunity" for private parties. The *Parker* rule does not involve any question of immunity; it deals only with considerations of causality.

In *Parker* it was claimed that an agricultural marketing program, established under California law through action of state officials, violated the Sherman Act because it restricted competition among growers. The Court assumed that the program would violate the Sherman Act if it were organized and made effective solely by private action, and

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and the Bureau published mileage guides for use in determining highway distances on which transportation charges are based. Terrell attempted to sell his guide to the Finance Center of the Defense Department and to the Defense Traffic Management Service, but the Bureau succeeded in persuading these agencies not to approve the Terrell guide. The court ruled that under *Pennington* efforts by the Bureau to prevent use of the Terrell guide were not actionable under the antitrust laws.

it also assumed that Congress had power to prohibit such a program because of its effect on interstate commerce. The Court pointed out, however, that the program was the result of state action, and it stated (317 U.S. at 350-51):

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . .
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. . . .
>
> There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only "business combinations." . . . That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history.

In view of the language and history of the Act, the Court concluded that "it must be taken to be a prohibition of individual and not state action." 317 U.S. at 352.

Thus, the relevant consideration in applying the *Parker* rule is not whether the government has intended to supplant competition with regulation, as the court below held, but whether the cause of the injury to the plaintiff was in fact government action. Where it is concluded that governmental action, or private conduct compelled by governmental action, has caused the injury alleged by the plaintiff, the Sherman Act has repeatedly been held inapplicable, and no recovery has been permitted against the private parties. See, *e.g.*, *Alabama Power Co.* v. *Alabama*

Elec. Co-op., Inc., 394 F.2d 672 (5th Cir.), *cert. denied*, 393 U.S. 1000 (1968); *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir.), *cert. denied*, 385 U.S. 947 (1966); *Hecht* v. *Pro-Football, Inc.*, 1970 Trade Cas. ¶73170 (D. D.C. 1970); *Independent Taxicab Operators' Ass'n* v. *Yellow Cab Co.*, 278 F. Supp. 979 (N.D. Cal. 1968); *Miley* v. *John Hancock Mutual Life Ins. Co.*, 148 F. Supp. 299 (D. Mass.), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957).[14]

By contrast, where the injury alleged by the plaintiff results from purely private action that is not in fact compelled by government mandate—even if taken within the ambit of a government enabling program—*Parker* is clearly inapplicable and private parties have frequently been held subject to Sherman Act liability. See, *e.g.*, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F.2d 502 (4th Cir. 1959); *Travelers Ins. Co.* v. *Blue Cross of Western Pa.*, 298 F. Supp. 1109 (W.D. Pa. 1969).[15]

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[14] *Miley* involved action by a government agency acting in a "consumer" capacity, and it is difficult to distinguish the case from the instant case. In *Miley* it was charged that several insurance companies that sought a contract to provide group insurance for state employees conspired with the contracting agency to exclude a competing bidder that had submitted a lower bid. The district court held that any injury to the disappointed bidder resulted from action taken by agents of the government carrying out official duties, and that under the rule of *Parker* the Sherman Act was not applicable. The court below affirmed *per curiam*.

[15] The distinction between action taken or compelled by the government and action taken by private parties within the framework of a government program was clearly drawn in *Wainwright* v. *National Dairy Prods. Corp.*, 304 F. Supp. 567 (N.D. Ga. 1969). Under a Georgia statute "recommended" prices for milk set by a state milk control commission had to be followed by producers

The essence of the lower court's decision in the instant case is that private injury caused by governmental action *can* give rise to liability under the antitrust laws when the government is acting as a consumer and the legislature has not evidenced an intention to supplant competition with a scheme of regulation. Petitioners respectfully submit that *Parker* establishes the clear rule that valid governmental action cannot form the basis for a private claim under the antitrust laws irrespective of the context in which it is taken, and that the lower court's decision is in clear conflict with this rule.

II.

The Question Presented Is of Major Public Importance

Prompt and definitive resolution of the issue raised by the decision of the court below is of great public importance in the application of the federal antitrust laws for two reasons: First, because the bases upon which the court below attempted to distinguish *Parker, Noerr* and *Pennington* are vague and tenuous, it will be extremely difficult for parties dealing with government agencies to predict whether their activities may be held subject to the antitrust laws. The inevitable effect of this uncertainty will be to impose substantial and unwarranted inhibitions upon communications by such parties to government officials.

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unless they took elaborate steps to remove themselves from the statutory compulsion. The court recognized that *Parker* would constitute a defense to a price-fixing charge against producers who followed the "recommended" prices, but only "to the extent that evidence indicates that the identity of bids resulted from the force of the statute, rather than from a conspiracy." 304 F. Supp. at 574-75.

Second, the court's decision casts substantial doubt on the lawfulness under the antitrust laws of concerted efforts by sellers to influence government purchasing practices through the promotion of standards and specifications—activity held "constitutionally protected" in *Johns-Manville*, 259 F. Supp. at 452-53. In any case where a government purchasing or standard-setting agency adopts such standards or specifications it is likely that potentially competitive products may be excluded from a government procurement. Under the lower court's decision any such exclusion could be made the subject of an attack under the antitrust laws—against the private parties or government agencies involved, or both—notwithstanding the fact it was caused by valid governmental action.

A. The Effect of the Lower Court's Decision Will Be To Impede Free Communication With Government Agencies

Noerr and *Pennington* reflect and have been taken to represent a broad judgment that citizens should be permitted to communicate with government agencies and officials and to seek government action on matters of their own self-interest without fear that such conduct might subject them to substantial penalties under the antitrust laws. As the Court pointed out in *Noerr* (365 U.S. at 139):

> [I]t is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to peti-

> tion in the very instances in which that right may be of the most importance to them. We reject such a construction of the Act . . . .

Nothing in *Noerr* or *Pennington* suggests in any way that this Court intended to condition the rule of antitrust immunity set down in those cases upon the nature of the government action sought, or to deprive a party of that immunity when it sought to influence governmental purchasing decisions. Indeed, *Pennington* itself involved concerted efforts, motivated by anticompetitive purposes, to influence the purchasing practices of a major federal agency.

In expressing doubt that this Court "would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings," the court below created a wholly artificial distinction between "commercial dealings" and policy-making or "political" activity. While it may be true, as the court of appeals noted, that "government is the largest single customer in our economy" (App. A, p. 17a), there are significant differences between public and private purchasing. Unlike private purchasers, governments frequently use their purchasing power to effect public policies that go beyond the scope of a particular procurement, thus acting as customer and policy-maker simultaneously. For example, federal procurement has been used as an instrument to achieve improved labor conditions;[16] to preserve small business;[17] to reduce unemploy-

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[16] Walsh-Healey Act, 49 Stat. 2036, as amended, 41 U.S.C. §§ 35-45; Service Contract Act of 1965, 79 Stat. 1034, 41 U.S.C. § 351 *et seq.*; Davis-Bacon Act, 46 Stat. 1494, as amended, 40 U.S.C. § 276a; Work Hours Act of 1962, 76 Stat. 357, 40 U.S.C. § 327 *et seq.*

[17] Small Business Act, § 8(a), 72 Stat. 389, as amended, 15 U.S.C. § 637(a).

ment;[18] to foster American merchant shipping[19] and domestic industry;[20] and to promote motor vehicle safety.[21]

Moreover, there is an element of "policy-making" present in every government procurement, for decisions as to factors such as cost, quality, performance capability, safety and the needs of the community for the procurement itself will inevitably reflect the purchasing agency's concern with matters of public interest. Thus, the line between "policy-making" and purely "commercial" activity is thin, at best, and it would vastly oversimplify the complex nature of government procurement to attempt to distinguish between purchases in which ulterior policies are advanced and purchases "based solely on economic considerations".

A seller who wants to persuade a government agency to purchase his product, rather than that of his competitor, will naturally attempt to bring to bear as many considerations as possible to achieve that purpose, irrespective of whether they relate to "policy" or "commercial" considerations. In *Pennington,* for example, the arguments addressed to TVA in an effort to persuade it to reduce its spot market purchases undoubtedly related to the improvement of wage conditions in the coal industry. In the instant case the arguments related to such matters as the performance characteristics of the recirculation system,

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[18] Defense Manpower Policy No. 4, revised June 6, 1960, as amended October 17, 1967 and July 20, 1968, 32A C.F.R. Chap. 1.

[19] Cargo Preference Act, § 901, 68 Stat. 832, as amended, 46 U.S.C. § 1241(b).

[20] Buy American Act, 47 Stat. 1520, 41 U.S.C. § 10a.

[21] Motor Vehicle Safety Device Law, 78 Stat. 696, 40 U.S.C. §§ 701-03.

the desirability of various types of steel and the experience of the manufacturer. In both cases, however, the motivation of the seller was the same—to gain competitive advantage.

Even if a clear distinction could be drawn in practice, it is difficult to perceive any rational basis for exempting sellers from antitrust liability where they seek to exclude competitors through "regulatory" action—as the lower court appears to have viewed the mineowners' efforts in *Pennington*[22]—and subjecting them to potential liability where they seek only to influence government "consumer" decisions. In either case the seller's purpose is to exclude competition and the effect upon the competitor is the same, whether the exclusion is achieved by the adoption of a strict legislative or regulatory standard or through promulgation of restrictive specifications.

As a practical matter, the distinction between "regulatory" and purely "economic" government action cannot be clearly drawn, and a rule that would condition antitrust liability upon such a characterization of governmental motivation will therefore inevitably have the effect of inhibiting communications by citizens to their governments. In view of the awesome penalties that may be assessed in a private antitrust action, not to mention the considerable expense, time and business disruption involved in defending such an action even if lacking in merit, sellers are not likely to communicate freely when

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[22] The court of appeals' view as to the character of the mineowners' efforts was not affected by the fact that the mineowners made direct approaches to TVA, the purchasing agency. It simply asserted that such approaches seem "a reasonable addendum to the main proceeding before the Secretary [of Labor]." (App. A, p. 13a, n. 7)

their communications could invite antitrust attack by a disappointed competitor. Thus, the result of the lower court's decision will be to interfere with the flow of information to government agencies and to deprive government of valuable sources of information—a result directly contrary to the purpose this Court expressly sought to achieve in *Noerr*.

In short, the court of appeals' decision lacks the "narrow specificity" this Court has held to be required when first amendment freedoms are subjected to legal limitations. *NAACP* v. *Button*, 371 U.S. 415, 433 (1963). The Court has frequently had occasion to take note of the "chilling effect" that unclear rules of law may have upon the free exercise of first amendment rights, and it has indicated the strong view that vindication of freedom of expression should not have to await the outcome of protracted litigation. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 487 (1965). It has observed that first amendment freedoms "are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *NAACP* v. *Button*, *supra*, 371 U.S. at 433. Petitioners submit that identical considerations dictate prompt review of the lower court's decision in this case.[23]

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[23] The court below was of the view that its decision would not encroach upon first amendment rights because "the First Amendment does not provide the same degree of protection to purely commercial activity that it does to attempts at political persuasion." (App. A, p. 16a) The difficulty with this view is that it leads to an anomalous conclusion: A seller of goods to the government may freely exercise first amendment rights, in an attempt to exclude competitors, by seeking the adoption of restrictive legislation, regulations or policies that have nothing to do with the quality or performance of the product he is selling—since that activity is mere "political persuasion." But his exercise of those same rights is limited when he seeks to accomplish the same result

B. The Lower Court's Decision Casts Substantial Doubt on the Lawfulness of Joint Efforts To Promote Adoption of Government Standards

Quite apart from the *in terrorem* effect that the lower court's decision will have upon individual sellers of products to the government, it casts serious doubt on the lawfulness of any joint activity by sellers directed toward the adoption by government agencies of product standards and specifications. Such activity is both widespread and of great importance to government procurement.

The *Directory of United States Standardization Activities*, published by the National Bureau of Standards,[21] lists 486 organizations that engage in the development and promotion of standards and specifications. A great many of these are trade associations that have been formed to promote the use of their members' products, and one of the principal activities of such organizations is to communicate with government agencies in the development of specifications relating to the products of their members. Indeed, such communications are an essential part of the process of developing government specifications.

For example, the General Services Administration, a federal agency charged with a broad range of procurement responsibilities, promulgates a wide variety of federal specifications that are mandatory for use in the procurement of supplies and services by federal agencies. 41 C.F.R. § 101-29.000 *et seq.* Participation by industry

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by arguing the merits of his product directly to the people responsible for purchasing it—for this is merely an exercise in crass "commercial activity."

[21] U. S. Dept. of Commerce, National Bureau of Standards (Misc. Pub. 288, 1967).

groups and interested suppliers is recognized as an important aspect of the development of such specifications, and industry recommendations are encouraged. Indeed, as the National Bureau of Standards has pointed out, the involvement of private industry in the process of establishing standards and specifications is important as a means of increasing the quality and lowering the cost of goods that are purchased. Suppliers are not only consulted on specifications, but are encouraged to recommend substitute items offering the same or better service at lower cost than those covered in existing specifications. Consideration can then be given specification revisions for future invitations to bid." U. S. Dept. of Commerce, National Bureau of Standards, *Directory of United States Standardization Activities* 248 (Misc. Pub. 288, 1967).

Whenever a government procurement specification is adopted, some products that might potentially be sold to the government will inevitably be excluded. As one court has pointed out, "any system of standards pre-supposes that there are standard and non-standard items. Those who produce products which are not standard are to some degree penalized and trade is to some degree restrained." *Structural Laminates, Inc.* v. *Douglas Fir Plywood Ass'n*, 261 F. Supp. 154, 159 (D. Ore. 1966), *aff'd*, 399 F.2d 155 (9th Cir. 1968), *cert. denied*, 393 U.S. 1024 (1969). Under the decision of the court of appeals, the activity of a trade association that is successful in bringing about the adoption of exclusionary specifications could be characterized as a conspiracy to boycott, and thus unlawful *per se* under the Sherman Act. See *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Eastern*

States Retail Lumber Dealers' Ass'n v. *United States*, 234 U.S. 600 (1914). As such, the conduct of the association could not be justified on any broader grounds of public policy. As one court of appeals has said:

> Neither the fact that the conspiracy may be intended to promote the public welfare, or that of the industry, nor the fact that it is designed to eliminate unfair, fraudulent, and unlawful practices is sufficient to avoid the penalties of the Sherman Act.

American Medical Ass'n v. *United States*, 130 F.2d 233, 249 (D.C. Cir. 1945), *aff'd*, 317 U.S. 519 (1943).

Moreover, if such private activity is unlawful, it is difficult to see how the responsive government action itself can be upheld. If *Parker* is properly interpreted as excluding government activities from the Sherman Act only when taken in the context of a regulatory scheme intended to supplant free competition, the effect of the court of appeals' decision could be to create a new and potent weapon for disappointed bidders and suppliers of substandard products to interfere with government procurements by direct action against government agencies and officials. Thus, the lower court's decision has the potential not only for causing incalculable disruption to the activities of hundreds of trade groups that have for many years participated in the development of standards and specifications for government purchases, but for providing a basis for serious disruption of the purchasing process itself.

CONCLUSION

The federal antitrust laws cannot be made to serve as a panacea for all of the discomfiture endured by businessmen in their efforts to sell their products. The clear and well-settled teaching of this Court has been that private injury caused by government action cannot be the basis for recovery under the Sherman Act—even if induced by concerted and ill-motivated private action. The lower court's decision in this case has departed from this rule and has created a remedy under the antitrust laws where none had been thought to exist before. Petitioners submit that such an expansion of the Sherman Act is both unwarranted in law and undesirable in fact. As one court has said:

> It would be no service to the Sherman Act, which plays such a vital role in preserving our free economy, to attempt to drag within its scope every kind of misconduct which seems to fit nowhere else.

Parmalee Transp. Co. v. *Keeshin*, 186 F. Supp. 533, 547 (N.D. Ill. 1960), *aff'd*, 292 F.2d 794 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961).

Petitioners submit that the decision of the court below is clearly erroneous and should be reversed by this Court. However, if exceptions are to be created to the *Noerr-Pennington* and *Parker* rules, it is important—particularly in view of the vast amount of commercial activity carried on daily between governments and private suppliers—for this Court to indicate promptly how the boundaries of those exceptions are to be determined.

For the foregoing reasons the writ should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 7381.

GEORGE R. WHITTEN, JR., INC.,
doing business as Whitten Corporation,

Plaintiff, Appellant,

—v.—

PADDOCK POOL BUILDERS, INC., *et al.*,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before:

ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

John E. Lecomte, with whom *Princi & Lecomte* was on brief, for appellant.

John D. Hawke, Jr., with whom *Paul A. Good, Arnold & Porter* and *Butterworth & Good* were on brief, for appellees.

March 25, 1970.

COFFIN, *Circuit Judge*. This is an appeal from a summary judgment dismissing plaintiff-appellant's civil antitrust complaint. Appellant, George R. Whitten, Jr., Inc. [Whitten] is in the business of designing and manufacturing swimming pool gutters and accessory equipment and of serving as general contractor for the construction of entire swimming pool facilities. Appellees are three affiliated corporations [hereinafter, singly Paddock][1] which engage in the same business. Both Whitten and Paddock specialize in the manufacture of prefabricated "pipeless" pool gutters, which include recirculation equipment as an integral part of the gutter assembly and thus eliminate the need for pipe buried around the perimeter of the pool. Paddock's product, the "Integral Flow Recirculation System", is patented; Whitten's basically similar product, the "Uniflow System", apparently is not.

The case arises out of the efforts of both parties to sell their products to public bodies acting under competitive bidding procedures. Whitten's complaint charges that Paddock's selling efforts have violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 and § 3 of the Clayton Act, 15 U.S.C. § 14. Specifically, counts I through III of the complaint allege that Paddock and its various dealers and representatives violated § 1 of the Sherman Act by conspiring to require the use of its own specifications in the public swimming pool industry, with the intent to exclude all others, accompanying this effort with misrepresentations

[1] Paddock of California, Inc. franchises dealers with the right to use its trade names, trademarks, and patents. Paddock Pool Equipment Co., Inc. manufactures water circulation and filtration systems and other accessories for swimming pools. Paddock Pool Builders, Inc. constructs and installs swimming pools in the northeastern part of the United States, using products of Paddock Pool Equipment Co.

regarding Whitten, and threats of litigation and harassment directed to Whitten and its present or prospective customers. Counts III-VI describe roughly the same acts as attempts to monopolize in violation of § 2 of the Sherman Act. Count VII alleges that Paddock has violated the Clayton Act by representing to public customers that they must use Paddock accessories whenever they use Paddock's patented gutter system.

During the process of taking depositions, Paddock moved for summary judgment, conceding for the purpose of the issue raised by the motion that it had combined with dealers and others to effect the use of its specifications in the public swimming pool industry, that its specifications were so drawn that only it could comply, and that its purpose was to eliminate competition. It further conceded that these propositions "substantially embody" all of Whitten's Sherman Act allegations. The court granted the motion for summary judgment, without opinion, but in the context of briefs and argument directed to the proposition that *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) immunizes from antitrust law liability all efforts to induce governmental bodies to take action, notwithstanding the motives of the inducers. The case comes to us on the basis of the pleadings, answers to interrogatories, depositions, and an affidavit.

Our standard, of course, is whether, viewing the evidence favorably to Whitten, there is any fact in dispute which could be material to resolution of the legal issue. *Rogen* v. *Ilikon Corp.*, 361 F.2d 260, 266 (1st Cir. 1966). Paddock, using a perfectly proper tactic to bring sudden death to litigation which could be protracted, has conceded far more concerning its motives and techniques than any subsequent proof might establish. We judge it therefore by the following artificially stark set of facts.

The market for pipeless swimming pools is both relatively new and quickly expanding. Thus far, however, the greater initial expense of such pools has limited sales almost exclusively to public bodies or private bodies using public funds and subject to public bidding procedures. Although the number of firms supplying equipment for pipeless pools is unclear, Paddock is apparently the largest by far, doing business to some extent in all states, having at least 45 dealers, and making 20 times the installations as Whitten.

The public and quasi-public agencies who form the primary market for both Whitten and Paddock operate under a multiplicity of state and local bidding procedures, a factor which poses considerable difficulty in disposing of this case on summary judgment.[2] Nevertheless, the following skeleton procedure seems to be common. When a public body—for example, a school board—has received the authorization to construct a pool, it retains an architect or engineer to supervise the job. He then determines what products are available and prepares the technical specifications on which bids will be based. These specifications are then submitted to local authorities for clearance under health and building codes and finally to the school board. The school board, usually placing heavy reliance on the judgment of the architect, approves the specifications and invites bids. At this point, manufacturers may seek to have their products approved as equals to, or acceptable substitutes for, the equipment described in the specifications, but time is extremely short and the protests of rival suppliers

[2] For example, in the critical area of product and specification approval, the federal government maintains elaborate independent testing services and a system of appeals to the Comptroller General for suppliers aggrieved by decisions of the contracting authority. *See* R. Nash and J. Cibinic, *Federal Procurement Law*, 170-177 (1966). State and local authorities, however, sometimes delegate this function entirely to so-called "strong" architects hired to supervise a particular project.

are usually referred to the architect who drew up the original specifications.

Obviously, then, the original drafting of specifications is a critical stage for suppliers of pool equipment. Both Paddock and Whitten try to influence architects at this stage by publishing descriptions of their products in architectural catalogues. In addition, when Paddock learns of a forthcoming public pool project, one of its agents or dealers visits the architect charged with supervising the bidding. While Whitten also attempts to enter the scene at this early stage, its more limited resources prevent it from doing so on the same broad scale as Paddock. Paddock endeavors, with a high degree of success, to persuade the architect to adopt Paddock's own specifications. One witness deposed that "a good many architects . . . have evidently not written any specifications at all but allow Paddock to do so or used the specifications which Paddock supplied." These specifications are on their face neutral technical descriptions of generally available pool accessories, but a closer inspection reveals that they describe Paddock's products—and only those—in a variety of ways. They require that the recirculating and filtering systems be purchased from a manufacturer who has produced them for specified number of years—which only Paddock has done. Much of the equipment is described in a way that would rule out features of Whitten's equipment. The filter specification goes so far as to refer to Paddock equipment by Paddock's catalogue number. While the specifications provide for "an approved equal" for the described equipment, the specific functional or structural requirements would rule out the practicable possibility of an equal being accepted. Moreover, the time limitations on one who would submit a bid on alternative designs and equipment make such submission next to impossible.

Associated with this pressure to persuade architects to accept Paddock's proprietary and exclusionary specifications is other conduct which, under the ground rules of this case, we are to take as established. This includes falsely advertising that Paddock is the only manufacturer of pipeless swimming pool equipment and that its designs have benefitted from its national swimming program—which in fact is non-existent; false statements about Whitten's lack of experience; and threats of litigation against public bodies and contractors who have contracted with Whitten or contemplate doing so.[3]

We are therefore confronted, for the purposes of this appeal, with government acting in a proprietary capacity, purchasing goods and services to satisfy its own needs within a framework of competitive bidding, where the initial responsibility for recommending specifications has been entrusted to a hired professional, and where the selling effort directed at that professional and his public client by a leading supplier was monopolistically motivated and ran the gamut from high pressure salesmanship to fraudulent statements and threats.

Paddock is willing to present its case in this posture —as it says, "The most extreme state of facts imaginable" —because of its confidence in the proposition that efforts by private parties to influence the actions of government cannot violate the antitrust laws, even though such efforts

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[3] Paddock feels that these allegations are not germane, in part because deception does not vitiate an otherwise valid *Noerr* defense, 365 U.S. at 145, and in part because Whitten has not challenged the validity of Paddock's patent. *Noerr*, apart, however, we think systematic tale-telling coupled with other relevant factors such as conspiracy or monopoly power may constitute an antitrust violation. We also doubt whether one must as a matter of law challenge the validity of a patent in order to complain of the uses to which it is put. *Cf. United States* v. *Singer Manufacturing Co.*, 374 U.S. 174 (1963).

are intended to eliminate competition. In support of this proposition, Paddock advances two separate but related principles of antitrust exemption. First, drawing on *Parker* v. *Brown*, 317 U.S. 341 (1943), Paddock argues that restraints of trade which result from valid governmental action cannot give rise to private antitrust liability. Second, relying primarily on *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, supra* and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), Paddock maintains that joint efforts to influence public officials are beyond the scope of the antitrust laws.[4]

These propositions find ample support in the language of the Supreme Court opinions on which Paddock relies. None of these cases, however, addresses the factual profile presented here,[5] and we are particularly reluctant to rely on verbal formulae to solve problems of antitrust liability. The Sherman Act has been interpreted as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). In the light of this purpose, courts in considering conspiracies

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[4] While the two doctrines are often treated as one, we agree with Paddock's separate treatment of each. The two are not coterminous. For example, an unsuccessful attempt to influence government action may fall within the *Noerr-Pennington* immunity, but not the *Parker* immunity. Conversely, a state regulatory agency may decide to restrain competition without prompting; the benefactors, not having solicited government action, would enjoy a *Parker* immunity but not one based on *Noerr-Pennington*. Moreover, because of its First Amendment overtones, the *Noerr-Pennington* immunity is arguably broader than the *Parker* exemption.

[5] Paddock has cited one lower court decision, *United States* v. *Johns-Manville Corp.*, 259 F. Supp. 440 (E.D. Pa. 1966), which involved substantially similar facts and raised, among others, the precise issue raised here. The court, relying on *Noerr* and *Pennington*, granted summary judgment for defendant without extended analysis. For reasons which we express in the text, we disagree with this broad application of the *Noerr-Pennington* rule.

to restrain trade have held that, "It is not the form of the combination or the particular means chosen but the result to be achieved that the statute condemns." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809 (1946). In a similar vein, courts have condemned otherwise innocent practices if exploited to achieve or maintain monopoly power. *United States* v. *Griffith*, 334 U.S. 100 (1948); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). There are occasional exemptions from the rule of unfettered competition for particular forms of combination and particular kinds of anti-competitive practices, but these exemptions are narrowly construed. *Cf. United States* v. *Borden Co.*, 308 U.S. 188, 196-202, 205-206 (1939); *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 347-349 (1963); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 216-220 (1966). With these strictures in mind, we turn to examination of the tributary doctrines on which Paddock relies for its claim of antitrust immunity.

The *Parker* v. *Brown* Immunity

We ask first whether the adoption of Paddock's specifications by public bodies brings Paddock within the protection of *Parker* v. *Brown*, *supra*. *Parker* grow out of the efforts of a packer of raisins to enjoin the operation of California's agricultural marketing scheme. The object of the scheme was to avoid ruinous competition by placing a certain percentage of every grower's crop within the control of a committee of growers and packers, who could then sell or withhold the produce as conditions dictated. The Supreme Court assumed that this program would violate the Sherman Act if it had been the product of private agreement. The Court, however, stressed that the program had been established under state legislation and was administered

by a group appointed by the Governor and confirmed by the State Senate. In the light of these indications of deliberate government guidance, the Court concluded:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 350-351.

The Court's emphasis on the extent of the state's involvement precludes the facile conclusion that action by any public official automatically confers exemption. As one commentator has observed, the assertion that an act is "valid governmental action . . . suggests inquiry rather than ends it. . . . Generally, the underlying issue in determining the applicability of such an exemption is the degree of governmental involvement in, and supervision over, the allegedly wrongful private activity." Comment, *Alabama Power Company* v. *Alabama Electric Cooperative, Inc.*, 55 Va. L. Rev. 325, 345-346 (1969). Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation.

In terms of such deliberate governmental occupation of a field normally left to the free winds of competition, this case falls at the opposite end of the spectrum from *Parker*.

At the *Parker* end of the spectrum lie cases like *Trucking Unlimited* v. *California Motor Transport Co.*, 1967 Trade Cas., ¶ 72,298 (N.D. Cal. 1967), a case involving certification of common carriers, where the deliberate choice of a regulatory agency intervened between the private anti-competitive activity and the resulting restraint on trade, or cases like *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947 (1967), a suit involving an airport service franchise, where a state agency exercised broad authority to manage a monopoly in the public interest.[6] Even at this end of the spectrum, no exemption will be found if state encouragement of price stability falls short of the delegation and approval in *Parker*. *See Schenley Indus., Inc.* v. *New Jersey Wine & Spirit Wholesalers Ass'n*, 272 F. Supp. 872 (D. N.J. 1967); *cf. United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 561-562 (1944).

The middle of the spectrum is occupied by cases in which the state has chosen to regulate a field, but state policy is neutral or silent with respect to restraints of trade. Since there is no conflict in such cases between state regulatory action and the policy of unfettered competition, the courts have found no difficulty in denying

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[6] *See also Okefenokee Rural Electric Membership Corp.* v. *Florida Power & Light Co.*, 214 F.2d 413 (5th Cir. 1954) (state regulation of electric power lines along rights of way); *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000 (1968) (conditions imposed on loan by Rural Electrification Administration); *Miley* v. *John Hancock Mutual Life Insurance Co.*, 148 F. Supp. 299 (D. Mass. 1957), *aff'd*, 242 F.2d 758 (1st Cir. 1957) (state commission awarding insurance contract); *Independent Taxicab Operators' Ass'n of San Francisco* v. *Yellow Cab Co.*, 278 F. Supp. 979 (N.D. Cal. 1968) (awarding taxi stand concession under state law permitting exclusive awards). For an excellent summary of the law on conflicts between federal regulatory action and the Sherman Act, *see Northern Natural Gas Co.* v. *FPC*, 399 F.2d 953, 959-961 (D.C. Cir. 1968).

antitrust immunity. *Northern Securities Co. v. United States*, 193 U.S. 197, 347-350 (1904), cited in *Parker* v. *Brown, supra* at 351; *Travelers Insurance Co.* v. *Blue Cross of Western Penn.*, 298 F. Supp. 1109 (W.D. Pa. 1969); *cf. Asheville Tobacco Board of Trade, Inc.* v. *FTC*, 263 F.2d 502 (4th Cir. 1959).

In the case at bar, however, the state policy is neither anti-competitive nor neutral. When the government acts under laws requiring competitive bidding, it signifies its intent to respond to the signals of a competitive market on the same terms as any other consumer, an intent which is entirely consistent with the aims of the Sherman Act. This intent would be frustrated, and the ultimate cost to the public substantially increased, if some sellers could nevertheless engage in anti-competitive practices merely because they were dealing with the government. For example, suppose the plaintiff here was not a rival of Paddock, but a group of school boards seeking treble damages under the doctrine of *Georgia* v. *Evans*, 316 U.S. 159 (1942). It would be anomalous to dismiss the school boards' suit on the grounds that, by adopting Paddock's specifications, they had conferred immunity on monopolistic practices which they had never considered, which they lacked the authority to approve, and which undermined the entire process of competitive bidding. We conclude, therefore, that the adoption of Paddock's specifications by public bodies does not bring Paddock within the exemption for valid governmental action.

The *Noerr-Pennington* Immunity

Assuming that Paddock's conduct is not protected by the doctrine of *Parker* v. *Brown*, we next consider whether such conduct falls within the teaching of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*,

supra, and *United Mine Workers* v. *Pennington*, *supra*, which hold that joint efforts to influence public officials in the passage or enforcement of laws are beyond the scope of the antitrust laws. The basic case is *Noerr*, which grew out of a dispute between railroads and truckers. The railroads mounted an intensive but misleading publicity campaign to obtain anti-trucker legislation and to persuade the governor of a state to veto a pro-trucker bill. The truckers then brought suit, charging a conspiracy in restraint of trade. The Supreme Court reversed judgments of liability on two grounds. First the Court noted that:

> "To hold that the government retains the power to act in [a] representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." 365 U.S. at 137.

The Court then defined as "of at least equal importance" the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws," 365 U.S. at 139, a right protected by the First Amendment. The Court added that financial self-interest was an important motive in prompting citizens to participate in government.

The key to this decision, in our opinion, is the Court's heavy emphasis on the political nature of the railroad's activities and its repeated reference to the "passage or enforcement of laws." The entire thrust of *Noerr* is aimed at insuring uninhibited access to government policy

makers. A pluralistic society moves by many motives. The hope, supported by history, is that permitting every interest to be heard will produce a tolerable amalgam responsive to the needs of a given time. But the efforts of an industry leader to impose his product specifications by guile, falsity, and threats on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws. By "enforcement of laws" we understand some significant policy determination in the application of a statute, not a technical decision about the best kind of weld to use in a swimming pool gutter. *Noerr* alone, then, does not support Paddock's position.

Noerr was followed by *Pennington,* a case involving an effort by large mine operators and union officials to persuade the Secretary of Labor to prescribe higher minimum wages for companies selling coal to the TVA on long-term contracts. This effort at persuasion would seem to fall well within the *Noerr* immunity for attempts to influence the enforcement of laws. The Walsh-Healy Act, 41 U.S.C. § 35 *et seq.,* conferred considerable discretion on the Secretary of Labor to set wage levels in the public interest, and required the Secretary to observe the strictures of the Administrative Procedure Act, including notice, public hearing, and judicial review, in making wage rulings. 41 U.S.C. §§ 35(b), 43a; Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense,* 66 Mich. L. Rev. 333, 344-345 (1967).[7] Nevertheless, the

[7] Some have been troubled by the fact that the mineowners approached not only the Secretary of Labor, but also the TVA. *See* Note, *Application of the Sherman Act to Efforts to Influence Government Action,* 81 Harv. L. Rev. 847, 853 (1968). However, since the TVA had the power to undermine the Secretary's decision by making "spot market" purchases from low wage operators, the mineowners' conduct seems a reasonable addendum to the main proceedings before the Secretary.

trial court instructed the jury that efforts to influence the Secretary were illegal if part of a broader conspiracy to drive small mineowners from business. *Pennington* v. *United Mine Workers*, 325 F.2d 804, 817 (6th Cir. 1963). The Court of Appeals took an even more restrictive view, holding that *Noerr* shielded only good-faith attempts to influence public officials, "unaccompanied by a purpose or intent to further a conspiracy to violate a statute." 325 F.2d at 817. In rejecting this restrictive view of *Noerr*, the Supreme Court observed:

> "Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." 381 U.S. at 670.

Paddock seizes on this statement to buttress its position that efforts to influence any public official are exempt. In context, however, the Court's emphasis is not on the role of the public officials involved, but rather on the irrelevance of intent or conspiracy in applying the *Noerr* doctrine. Nevertheless, there remains the question of whether a particular attempt to influence a public official is the kind of political activity which *Noerr* protects. *Noerr* stressed the importance of free access to public officials vested with significant policy-making discretion. We doubt whether the Court, without expressing additional rationale, would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings when the case turned on other issues.

We find support for our reading of *Pennington* in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). In *Continental Ore*, a private firm acting as administrator of Canada's wartime rationing pro-

gram used its discretionary power to exclude a competing processor of vanadium ore from the Canadian market. The Supreme Court, stressing that there was no evidence that the Canadian government had approved of the conduct of its agent, held that such conduct was subject to the Sherman Act. In *Pennington*, the Court was careful to distinguish *Continental Ore* on the grounds that there was no indication that any Canadian official "would have approved of joint efforts to monopolize the production and sale of vanadium. . . ." 381 U.S. at 671 n. 4. Presumably a different result would have followed if defendant in *Continental Ore*, instead of seeking to subvert the administration of the rationing program, had boldly sought a change of policy from executive or legislative officials. *See* Costilo, *op cit.*, 66 Mich. L. Rev. at 347.[8]

The same logic applies in this case. The state legislatures, by enacting statutes requiring public bidding, have decreed that government purchases will be made according to strictly economic criteria. Paddock is free to seek legislative change in this basic policy, but until such change is secured, Paddock's dealings with officials who administer the bid statutes should be subject to the same limitations as its dealings with private consumers. Indeed, to hold otherwise might impair the effectiveness of competitive bidding. *See* Note, *op. cit.* n. 7, 81 Hary. L. Rev.

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[8] Unlike Paddock, we do not read *Continental Ore* to mean that any action by a Canadian public official would have resulted in exemption. An anti-competitive practice may receive only the most cursory inspection by public officials, *see Woods Exploration Co.* v. *Alcoa*, 36 F.R.D. 107 (S.D. Texas 1963), or public officials may approve conduct without consideration or awareness of its anti-competitive aspects. *Cf. Angle* v. *Chicago, St. Paul, Minneapolis and Omaha Rwy. Co.*, 151 U.S. 1 (1893). The issue in such cases is not whether the action was in form "governmental", but whether the real decision makers were public officials or private businessmen. *See* American Bar Association, *1955-1968 Antitrust Developments*, 211-12 (1968).

at 851-852 (1968). We conclude, therefore, that the immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes.

This conclusion does not, in our view, encroach on the freedom of speech and right to petition protected by the First Amendment. The First Amendment does not provide the same degree of protection to purely commercial activity that it does to attempts at political persuasion. *Cf. Valentine* v. *Chrestensen*, 316 U.S. 52 (1942); *Breard* v. *City of Alexandria*, 341 U.S. 622, 641-643 (1951). Moreover, the First Amendment does not prevent government from adopting reasonable rules for regulating the conduct of those who seek its favor. *United States* v. *Harriss*, 347 U.S. 612, 625-626 (1954). Finally, Paddock's right to tout its wares to government agencies, unlike the right to seek legislation involved in *Noerr*, is purely a creature of statute and must be exercised within the confines of bidding procedures designed to insure the maximum possible competition for the government's expenditures. In the light of these considerations, we see no constitutional objection to requiring that Paddock observe the same limitations in dealing with the government as it would in dealing with private consumers.

Nor do we see the practical difficulties which trouble Paddock. Paddock argues that by denying immunity we cast doubt on the legality of many existing public contracts and will in the future force public bodies to forego patented products and "procure at the lowest common denominator". Paddock has, however, confused the narrow issue of whether its conduct is exempt from antitrust regulation with the broader issue of whether it has in fact violated the Sherman Act. We address only the

question of exemption; we intimate no view on whether a violation has actually occurred. Paddock's conduct may on inspection prove to be the muscle flexing of a budding monopolist, or it may prove to be no more than a vigorous selling effort. Nor do we mean to condemn the publication of proprietary specifications. Such specifications undoubtedly provide a useful service to architects and engineers. We hold only that the legality of Paddock's selling methods is to be judged without regard to whether its customer is a private consumer or a public official acting under a competitive bidding statute. Those who sell to private developers under competitive bidding procedures have never enjoyed antitrust immunity. We doubt whether applying the same standard to dealings with public customers will prompt a wholesale repudiation of contracts or hamstring the efforts of public bodies to buy desirable products.[9]

On the other hand, we think that such an even-handed rule will promote the policy of free and unfettered competition which underlies the Sherman Act. Government is the largest single customer in our economy, with expenditures amounting to over $150 billion in 1966. Note, *op. cit.* n. 7, 81 Harv. L. Rev. at 847 n. 3. Occasionally, government may encourage activity which would otherwise violate the antitrust laws, *e.g.*, 50 U.S.C. App. § 2158, or use its purchasing power to promote broader objectives of public welfare, *e.g.*, Walsh-Healy Act, 41 U.S.C. § 35(b).

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[9] Our reliance on state bidding statutes should not be taken as approval of Whitten's argument that Paddock's selling efforts fall within the Sherman Act because Paddock's specifications are illegal under state bidding statutes. State law on the validity of restrictive specifications varies widely. 63 C.J.S. Municipal Corporations § 1149; 43 Am. Jur. Public Works and Contracts §§ 16-17. We do not, therefore, equate immunity with legality under state law. Rather, we rely on bidding statutes as clear indicia that government is acting as a consumer rather than as a regulator.

In this case, however, the government bodies which Paddock sought to influence were acting under elaborate bid procedures designed to insure that purchases were based solely on economic considerations. To hold that Paddock's conduct is exempt in such circumstances would be tantamount to a grant of total immunity for commercial dealings with the government. Our national reliance on the market to efficiently allocate resources would be misplaced if dealings with the nation's largest customer were totally exempt. We therefore hold that efforts to influence government officials acting under statutes requiring competitive bidding are within the scope of the antitrust laws.

Tying Agreements

Paddock has also moved to strike those portions of the complaint in which Whitten alleges that Paddock violated § 3 of the Clayton Act and § 2 of the Sherman Act by conditioning the sale of Paddock's patented gutter system on the purchase of Paddock accessories. These allegations, if true, would certainly constitute violations of the antitrust laws. *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969). Paddock, however, moved for summary judgment on the grounds that Whitten had failed to show any evidence of the illegal condition or agreement which is the gravamen of a tying offense.

As evidence of an illegal condition, Whitten relies primarily on the terms of Paddock's specifications, which, as we have seen, are widely adopted by contracting authorities. This document requires that a single manufacturer supply all the elements of the water recirculation system and expresses a preference for manufacturers who can supply accessories as well as recirculation equipment. Since only Paddock can meet these terms, a contracting

authority which adopts Paddock's specifications in order to obtain its gutter system will eventually purchase an entire equipment package from Paddock.

In reply, Paddock argues that the specifications, whatever their restrictive effect, are not an agreement between Paddock and the contracting authority, but are instead guidelines freely adopted by the contracting authority for the use of potential bidders. In Paddock's view, the tying effect in this case results not from an illegal agreement imposed by the seller, but from the buyer's desire to insure that his bidders supply complementary equipment of high quality.[10]

Whatever the ultimate merits of this argument, we must view it through the prism of summary judgment, which should be granted only when the truth is clear, when no material fact remains for trial, and when the moving party is entitled to judgment as a matter of law. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944). The Supreme Court has often expressed its reluctance to dispose of complex issues of economic fact through the relatively blunt tool of summary judgment. *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Kennedy v. Silas Mason Co.*, 334 U.S. 249 (1948). Moreover, a court has discretion to deny an otherwise justified motion for sum-

[10] In advancing this argument, Paddock places heavy reliance on the deposition of Mr. George Whitten, president of Whitten, Inc., who admitted that he did not intend to allege that Paddock refused to sell its gutter system unless the purchaser also agreed to buy accessory equipment. This admission, however, must be qualified by Mr. Whitten's later allegation that Paddock has engaged in discriminatory pricing which had the effect of a refusal to deal. Moreover, a seller need not refuse to sell his tying product outright in order to induce purchasers to enter an illegal tying agreement: he may, for example, offer discounts for those who purchase both tying and tied products or threaten litigation against those who refuse to accept the whole package. Mr. Whitten's admission does not, therefore, dispose of the tying issue as a matter of law.

mary judgment if the arguments of the parties have failed to clarify the underlying facts, *cf. Kennedy* v. *Silas Mason Co., supra* at 256, or if the motion is tainted with procedural unfairness. *Williams* v. *Howard Johnson's of Washington, Inc.*, 323 F.2d 102, 107 (4th Cir. 1963); 6 J. Moore, *Federal Practice* ¶ 56.15(6).

In the light of these teachings, we think that the summary judgment on the tying issue should not stand. The gist of Paddock's defense is that the restrictive specifications were not imposed by the seller, but freely adopted by the buyer. But the fact—which we must assume for purposes of summary judgment—that many contracting authorities are willing to adopt Paddock's restrictive specifications, contrary to their apparent economic interest, provides at least some basis for inferring an illegal understanding. *Cf. Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 221-227 (1939). The record also contains allegations of several instances in which Paddock used threats of patent infringement litigation to persuade reluctant purchasers of the merits of its gutter system. When the "tying" product is patented, an infringement suit can be a powerful weapon in controlling the market for the unpatented "tied" products. *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488, 493-494 (1942). Certainly, the tying issue would appear in a very different light if buyers regularly adopted Paddock's specifications in order to avoid litigation rather than because of the intrinsic merit of Paddock's products. Of course, unfavorable inferences about the motives of Paddock and its customers may be readily rebutted by appropriate evidence, but the arguments of counsel cannot supply the lack of such evidence in the record before us. On the basis of this scanty record, we cannot say that Paddock has conclusively dispelled the possibility of an illegal condition or understanding.

Norfolk Monument Co., Inc. v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969).

In addition, the record on appeal reveals considerable confusion about what Paddock conceded for purposes of its motion for summary judgment. In argument before the trial court, counsel for Paddock described his motion as essentially a motion to dismiss and stated that Paddock would concede all the material facts of the complaint. Counsel immediately clarified what this concession entailed for purposes of the first issue, the *Noerr-Pennington* defense, but failed to make his meaning clear with respect to the second issue, the tying agreement. As a result, counsel for Whitten, thinking that Paddock's motion raised only legal issues, declined the trial court's offer of additional time to complete the taking of depositions. As a further result, Whitten on appeal has relied on Paddock's concession, while Paddock has argued that Whitten introduced no evidence of an illegal understanding. We do not pause to apportion blame for this confusion, nor do we hold that such misunderstandings bar summary judgment in every case. In this case, however, we have already decided that there must be a remand to consider Whitten's charges of conspiracy and attempt to monopolize. Both these allegations and the charges of illegal tying arrangements seem to turn on essentially the same facts. We therefore conclude that sensible judicial administration requires that we give the parties additional opportunity to develop the facts relevant to the alleged tying arrangements.

The judgment granting summary judgment for the defendant is vacated and the case is remanded for proceedings not inconsistent with this opinion.

APPENDIX B

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. § 1 so far as pertinent:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

Section 2 of the Sherman Act, 15 U.S.C. § 2 so far as pertinent:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

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Supreme Court of the United States.

October Term, 1970.

No. 351

PADDOCK POOL BUILDERS, INC., PADDOCK POOL EQUIPMENT CO., INC., AND PADDOCK OF CALIFORNIA, INC.,
Petitioners,
v.
GEORGE R. WHITTEN, JR., INC.,
DOING BUSINESS AS WHITTEN CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT.

WAIVER OF RIGHT TO FILE BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The respondent, George R. Whitten, Jr., Inc., doing business as Whitten Corporation, hereinafter referred to as Whitten, waives the right to file a brief in opposition to the petition of Paddock Pool Builders, Inc., *et al.*, hereinafter referred to collectively as Paddock, for a writ of certiorari, and Whitten hereby joins in the petition for writ of certiorari and assigns as reasons therefor the following:

Reasons for Granting the Writ.

1. The question presented is substantial and one of major public importance.* Whitten disagrees with the interpretation by Paddock of the Circuit Court of Appeals' decision. However, the extent to which private parties may manipulate government bodies and affect competitive bidding where competitive bidding policy has already been established by government action is a substantial question of national public concern.

2. The effect of a final determination by this court of the issues decided by the Court of Appeals will be decisive as to the principal question of law in this case.

For the foregoing reasons, Paddock's petition for a writ of certiorari should be granted.

For the Respondent,
By his Attorneys,
PETER W. PRINCI,
JOHN E. LECOMTE,
PRINCI & LECOMTE.

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* Whitten is not in accord with Paddock's interpretation of the decision of the U.S. Circuit Court of Appeals (First Circuit), nor with Paddock's statement of the question presented. Whitten respectfully refers to the decision of the Court of Appeals for its content (Appendix A, pages 1a to 21a to petition for a writ of certiorari).